IP 03-1106-C T/K Johnson v Chao
Judge John D. Tinder Signed on 08/23/05

NOT INTENDED FOR PUBLICATION IN PRINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

BARBARA A. JOHNSON,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	1:03-cv-1106-JDT-TAB
	)	
ELAINE CHAO, SECRETARY OF LABOR,	)	
	)	
Defendant.	)	

ENTRY ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT[1]

Barbara Johnson was a federal employee who spent the last twelve years of her twenty-four year federal career with the U.S. Department of Labor ("DOL"), Office of Federal Contract Compliance Programs ("OFCCP"). She brings this lawsuit claiming to have been constructively discharged due to her age and gender or in retaliation for her complaints of discrimination. She also claims to have been the victim of age and gender discrimination during the course of the last two years of her career. The Defendant, Secretary of Labor, argues that there has been no invidious discrimination and that she, on behalf of the DOL, is entitled to a summary judgment because Johnson has failed to identify sufficient evidence to raise a material question of fact regarding the lack of actionable discrimination.

[1] This Entry is a matter of public record and will be made available on the court's web site. However, the discussion contained herein is not sufficiently novel to justify commercial publication.

Summary Judgment Standard

Summary judgment is appropriate when the record shows "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). A dispute about a material fact is "genuine" if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 248 (1986). In deciding whether a genuine issue of material fact exists, the court construes, as it has in this matter, all facts in the light most favorable to the nonmoving party and draws all reasonable inferences in favor of that party. *Id.* at 255.

A party moving for summary judgment "bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact." *Celotex*, 477 U.S. at 323. A party moving for summary judgment on a claim on which the non-moving party bears the burden of proof at trial may discharge its burden by showing, "that is, pointing out" an absence of evidence to support the non-movant's case. *Id*. at 325.

Factual Background

The OFCCP is a part of the DOL's Standards Administration which is responsible for enforcing discrimination statutes related to employment, particularly those applicable to companies with federal contracts or entities which receive federal money. A district office for the OFCCP is located in Indianapolis. Johnson was an Equal Opportunity

Specialist ("EOS") working out of the Indianapolis office. An EOS conducts and reports on investigations and compliance reviews of manufacturing companies, colleges and universities. The work of an EOS is assigned, scrutinized and reviewed for sufficiency by the District Director and an Assistant District Director.

Phillip Stepteau was the District Director in Indianapolis in 1996 and Christopher Edwards was the Assistant District Director. Edwards had become Johnson's direct supervisor in 1995; however, to Edward's dismay, Stepteau would sometimes deal directly with Johnson and others who held EOS positions under Edwards. Stepteau is described by most witnesses as having a domineering and intimidating personality and whose need for control often resulted in almost tyrannical micro-management. Johnson occupied an office right next to Stepteau and, according to both Edwards and Johnson, she was often subject to extended visits from Stepteau. Johnson claims Stepteau would discuss both business and non-business issues with her but that most of the time was devoted to non-business issues. Johnson would often go to lunch with Stepteau as well.

Johnson's career was somewhat unremarkable prior to 1995. She had experienced no significant attendance or disciplinary problems. Her performance reviews had generally been adequate. Although she never completed her investigations within the sixty day time period called for in the applicable regulations, that was not uncommon for the Indianapolis office, and she failed to obtain written extensions of time only occasionally. After becoming Johnson's supervisor in mid-1995, Edwards issued a number of critical reviews of the compliance reports prepared by Johnson and also criticized her efficiency. According to Johnson, Edwards began to be "nit-picky" with

regard to her work. By late 1995, Johnson claims that Stepteau, too, was acting more negatively toward her, raising his voice to her and calling her negative names. However, she says he still sought her attention by visiting her office to converse several times a day. Stepteau had promoted Johnson to the GS-12 level she held and, up to that point, had never been particularly critical of her work.

Edwards observed that Stepteau had certain favorite employees, Johnson being one of them. Edwards believed those employees were less productive and avoided criticism because of their relationship with Stepteau. He judged the relationship between Stepteau and Johnson to be too friendly, inappropriate and negatively affecting Johnson's performance. Accordingly, in early 1996 he approached Stepteau and voiced his concern over the favoritism he showed Johnson. The result, according to both Edwards and Johnson, was that Stepteau immediately began acting much more negatively toward Johnson, criticizing her work and avoiding the previously routine social interactions. Through June of 1996 both Edwards and Stepteau were critical of Johnson's performance. Johnson believes the two scrutinized her work that spring more fully than they did other employees. However, she was never disciplined, demoted, suspended or recommended for a performance improvement plan.

Johnson tripped over a telephone cable while at work on June 11, 1996. She suffered a soft tissue injury to her neck and lower back. She was absent from work from June 12, 1996 through July 26, 1996, on Continuation of Pay ("COP") status as allowed by the Office of Worker's Compensation. As time went on, she applied for additional periods of paid absence based on both physical injury and emotional stress through

worker's compensation, but those applications were denied. Though a worker's compensation claim is filed, an employee is still required to stay in contact with her supervisor to gain approval of any absences. Worker's compensation claims and approval of leave are contemporaneous but separate processes, with appeals of worker's compensation claims often taking months to conclude. On June 24, 1996, Edwards sent Johnson a letter reminding her that it remained her responsibility to stay in contact with the local office and gain approval of any extended absences. He asked that she provide a description of her medical condition, dates of treatment, and an estimated duration of her incapacity in the form of a dated medical certification signed by a doctor, nurse or doctor's assistant.

On July 5, 1996 Mr. Edwards received a handwritten note from the office of Dr. Segal, Johnson's physician, which did not include dates of treatment or a legible signature, but did indicate that Johnson would need to be off work another six to twelve weeks. Edwards forwarded the note on to Susan Robson at the regional human resources office in Chicago. Because the note was deficient, Robson drafted a memo to Johnson pointing out the deficiencies and sent the letter on to go out under Edwards's signature. Along with the memo, which indicated that Johnson was required to provide a medical certificate which complied with the agency rules, Edwards sent Johnson a form for requesting leave. The memo indicated that if Johnson was going to be off work past July 23, 1996, she needed to complete and submit the leave request form. Johnson complied by sending in two separate leave requests, one for the application of earned sick leave and the other for annual leave. Those requests were approved for leave

through October, 4 1996.

On October 7, 1996, Johnson returned to work with a note from Dr. Segal indicating that she could return for up to four hours per day until further notice. However, Johnson did not come back to work the following day. She telephoned Stepteau to indicate that her return to the office had been stressful, causing her to become sick to her stomach. She indicated that the experience the previous day convinced her she could not return to work yet. Stepteau was also told by Johnson that she would be seeing a doctor to whom the Office of Worker's Compensation was referring her and that she would provide the office with the results of that examination. She also later telephoned Edwards twice to tell him that she would not be coming in and referred him to Stepteau to find out what was keeping her from work. Edwards and Stepteau held a telephone conference with Robson and Deputy Regional Director, Brenda Joyce, on October 8, 1996, to discuss the unusual circumstances surrounding Johnson's return to work and then refusal to return. As a result of that meeting, Edwards wrote to Johnson and explained that she would be classified as absent without leave ("AWOL") until such time as she provided the appropriate medical documentation to support her absence from work.

On October 10, 1996, Edwards received a fax from Dr. Segal's office with a note that said "Trial work period was unsuccessful Pt off of work until further notice." Edwards sent it on to Robson, who determined that the lack of any signature or estimated time of disability along with the lack of any description of the medical condition or treatment provided caused the faxed note to be unacceptable to allow approval of further leave.

Again a letter was sent by Edwards to Johnson indicating the last note was unacceptable and pointing out what information needed to be provided. She was also informed in the letter that until adequate information was submitted, she would be considered AWOL.

On October 18, 1996, Johnson had a cover letter hand delivered to Stepteau and Edwards along with three leave application forms and a partially completed total disability claim form to be submitted for worker's compensation. The cover letter indicated that she was seeing a neck and back specialist, Dr. Hall, and was also suffering from depression as a result of what she described as "the harassment I have been subjected to prior to and after 6-11-96, the date of my physical injuries." A form from Dr. Hall's office with a box checked indicating that the patient was totally disabled until November 15, 1996, was also included. On the signature line of the form was a single letter "C". These items were all sent on to Robson at human resources. Robson found the leave requests and form from Dr. Hall to be unacceptable because of the lack of signature from the medical provider and the failure to provide a description of the disability or of the treatment being provided.

Again, in response to Johnson's submission, Robson drafted a letter for Edwards's signature. The letter to Johnson indicated that the two annual leave requests were being denied because they were not timely submitted and her absence was having an undesirable impact upon her department. It further outlined the deficiencies in the medical documents which accompanied the leave requests and denied the third request, which sought leave without pay ("LWOP"), warning that the failure to provide appropriate medical documentation would result in denial of any requests for LWOP. Johnson was

told that she was considered to be AWOL until she either returned to work or received an approved leave. All of the leave denials were appropriate pursuant to department regulations and the collective bargaining agreement with Johnson's union.

Without notice, Johnson showed up for work on October 24, 1996. She testifies that she was afraid of losing her job if she did not return. However, her return was cut short by her own immediate and dramatic reaction to being back in the workplace. In short, Johnson suffered a breakdown at work. According to Stepteau, Johnson was typically a sharp dresser, but was unusually disheveled when she arrived that day. He states that she came to his office door and announced that she had returned to work and then immediately broke down sobbing and screaming. She was taken by wheelchair to the nurse's office.

In mid-November 1996, Johnson again submitted a leave request for LWOP. This request was rejected as well because of the lack of a physician's signature. The rejection letter also indicated that an independent doctor and the nurse from her own physician's office had provided information relative to Johnson's medical condition and worker's compensation claim and that information indicated that she had no medical work restrictions and was capable of performing her responsibilities. In the letter, Edwards specifically asked Johnson to have her physician identify any restrictions that might apply to her return to work and offered to approve leave time for any physical therapy she felt she needed to attend during the week as long as she came back to work. Johnson did not return to work, but did submit an acceptable leave request later in November and was granted LWOP from November 27, 1996 through December 30, 1996.

In December of 1996, Johnson sought to extend her leave further and submitted another medical certificate from Dr. Segal, indicating she needed to be off work another six weeks into the new year. Johnson sought to use some retained annual and sick leave hours before classifying the remainder of the requested extension as LWOP. Annual and sick leave were approved through January 16, 1997, and Johnson was informed of additional annual and sick leave available to her that would take her leave through January 29, 1997. However, the continued lengthy and indefinite LWOP which was requested was not approved because of the ongoing negative impact her absence was having on the efficient operation of the office. This response prompted three more leave requests from Johnson in early January. The request seeking to utilize the remaining annual and sick leave available was granted through a corrected date of January 27, 1997, but Johnson was informed that she would not be granted any further LWOP and needed to report to work in late January or face possible disciplinary action for the amount of AWOL time she was accumulating.

In March of 1997, Johnson had some additional medical information from her psychiatrist, Dr. King, hand delivered to the office. Because the letter from Dr. King referenced her worker's compensation claim number and a worker's compensation attending physician form was included, the information was forwarded on to the Office of Worker's Compensation. Stepteau sent a letter to Johnson at the suggestion of Robson, which indicated that the information from Dr. King had been forwarded on. That letter also informed Johnson that she might qualify for leave under the Family and Medical Leave Act ("FMLA") and informed her how she needed to proceed if that was something

she wanted to request. However, the letter also indicated that Edwards had transferred to another department and that Stepteau was her supervisor at the moment and was considering recommending her removal because of her continued unauthorized absences, her failure to communicate with the office, and the negative impact of her absences on the department.

Johnson did not communicate with the office regarding her return to work until she sent Stepteau a memo on May 6, 1997. The memo indicated that Dr. King's statement in the worker's compensation form she had previously sent should have been sufficient to notify the office of her current status. Further, she asked that she be sent a job duties description along with any forms that needed to be completed by her doctors and chided Stepteau for reminding her that she was on AWOL status. Again, a response was sent to Johnson telling her she needed to report to work immediately and that her new supervisor would be Shelia Greer, since Edwards had accepted a move to another office.

Johnson returned to work on June 9, 1997. She provided Greer with a letter from Dr. King stating that Johnson was released to work up to four hours per day, but should not be criticized or asked to work on time sensitive matters or tasks that would be new to her. She also gave Greer a letter from Dr. Segal which indicated Johnson had a lifting restriction but had been cleared by him to return to work on March 31, 1997. Johnson was placed on a half day schedule, but did not perform up to Greer's expectations. Nor did Johnson request FMLA leave to cover the half day she was not working. Consequently, she remained on AWOL status for the half days she did not work because she had used up all her available annual and sick leave and her absence from full time

work was considered to have a harmful effect on the department. Stepteau also issued a Notice of Proposed Removal, based upon the accumulation of AWOL time. The notice provided in detail the various time periods during which Johnson had been deemed AWOL and went through all the warnings she was given and the efforts made to assist her in her leave requests. The notice required Johnson to respond and she hired legal counsel to assist her at that point.

In August 1997, Johnson finally applied for FMLA leave, which was provisionally granted on the basis that she obtain the appropriate medical documentation to comply with the FMLA requirements. That was accomplished and, as of September 4, 1997, she received FMLA leave for the time she was not working. On September 12, 1997, Johnson asked to have the FMLA leave extended to cover full day absences. The full-time FMLA leave was granted. However, based upon a review of the removal specifications set forth in the Notice of Proposed Removal issued by Stepteau and the response to those specifications provided by Johnson,[2] Brenda Joyce, the Deputy Regional Director, determined that Johnson should be removed from federal service effective October 24, 1997. Johnson's aggregate unexcused absences were too much for Joyce to accept in light of Johnson's continuing failure to provide adequate documentation and the effect her absence was having on the department.

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[2] Johnson's response to the Notice of Proposed Removal was prepared by her legal counsel and, much like this lawsuit, argued that she was the victim of discrimination and retaliation for filing a grievance against Edwards and Stepteau. The grievance had been filed in August of 1996 and alleged harassment in the form of yelling and condescending comments from her supervisors. However, the grievance was not pursued past the second stage.

In order to preserve her retirement benefits, Johnson took advantage of an "early out" program that was available to DOL employees. Consequently she retired effective October 22, 1997. Meanwhile, on October 15, 1997, she filed her first formal EEO complaint[3] with the agency internal enforcement office, alleging retaliation and age and sex discrimination in connection with her attempts to obtain leave. She filed a second formal complaint in January of 1998. The second complaint similarly alleged sex and age discrimination as well as retaliation, this time in connection with her receipt and the approval of the Notice of Proposed Removal from federal service, which caused her to take early retirement. After a hearing on the combined claims, a negative decision and an unsuccessful appeal, Johnson brought this lawsuit. She claims age and gender discrimination in connection with Edwards and Stepteau's scrutiny of her work in early 1996. She asserts the same discrimination in connection with the scrutiny and difficulty in obtaining approved leave and adds a retaliation claim, asserting that the leave approval difficulties followed her filing of a grievance complaining of Edwards and Stepteau. Finally, she alleges she was constructively discharged, insofar as she was forced to accept early retirement as a result of discrimination and retaliation which led to her being given notice that she would be removed from federal service.

[3] Johnson first contacted an agency EEO counselor on August 29, 1997, with the telefax of an informal complaint.

Analysis

Because she lacks direct evidence of discriminatory intent on the part of the DOL, Johnson must establish her prima facie case of discrimination or retaliation by showing that 1) she is a member of a protected class or was engaged in protected activity (such as registering a complaint), 2) in terms of her job performance, she met the employer's legitimate expectations, 3) her employer took adverse employment action against her, and 4) her employer treated more favorably similarly situated employees outside of the protected class or who did not make complaints of discrimination. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Patt v. Family Health Sys., Inc*., 280 F.3d 749, 752 (7th Cir. 2002). The *McDonnell Douglas* template calls for the defendant employer to articulate a legitimate non-discriminatory reason for its action if the plaintiff meets her obligation of establishing the four elements of her prima facie case. *McDonnell Douglas*, 411 U.S. at 802; *Sartor v. Spherion Corp.*, 388 F.3d 275, 278 (7th Cir. 2004). If that reason stands unrebutted, the plaintiff's claim is defeated, but if the plaintiff can establish by a preponderance of the evidence that the reason is actually a pretext for discrimination, she prevails. *McDonnell Douglas*, 411 U.S. at 803; *Sartor*, 388 F.3d at 279.

Protected Status

Johnson meets the first prima facie case requirement with respect to each of her theories because she has established that she is over forty, a female and complained of age and sex discrimination on the part of Edwards and Stepteau. The grievance she filed

in August of 1996 alleged that the two had acted in violation of the contract provisions prohibiting management from discriminating based upon age or sex. Johnson made the grievance form a part of the record in this matter by submitting it as an attachment to her affidavit. Though the form does allege a violation of the no discrimination provisions of the contract, it is unclear from the fact section of the form exactly how, or why, she believed the conduct complained of was rooted in sex or age discrimination. She described the conduct as sabotaging her work product, giving written reprimands, yelling and addressing her in a condescending manner, all unlike how others were treated. The fact section also references a four page letter which was originally attached to the grievance form, but is unfortunately not a part of the record before this court. In any event, the grievance cover sheet is sufficient to demonstrate that Johnson "opposed" allegedly unlawful discriminatory conduct. Unlawful retaliation is not limited to retaliation for the filing of an EEO charge. *Worth v.* Tyler, 276 F.3d 249, 265 (7th Cir. 2001). Filing of a grievance is sufficient to establish the prerequisite "opposition" to practices made unlawful by Title VII or the ADEA and satisfy the first element of a retaliation claim. *Lang v. Ill. Dep't of Children & Family Servs.*, 361 F.3d 416, 419 (7th Cir. 2004).

Meeting the Employer's Legitimate Performance Expectations

Moving on to the second element, the Defendant argues that Johnson was not performing up to the legitimate and reasonable expectations of the department. It claims that her absenteeism and failure to comply with agency regulations prevents Johnson from establishing that she was meeting expectations. First, whether or not a person is meeting an employer's expectations is to be measured at the time of the alleged adverse

employment action. *See King v. Rumsfeld,* 328 F.3d 145, 149-150 (4th Cir. 2003); *Peele v. Country Mut. Ins. Co.,* 288 F.3d 319, 329 (7th Cir. 2002); *Cengr v. Fusibond Piping Sys., Inc.*, 135 F.3d 445, 453 (7th Cir. 1998). Johnson has alleged three adverse employment actions.[4]

In early 1996 Johnson claims that both Edwards and Stepteau began scrutinizing her work to a much greater degree than it was scrutinized previously and to a greater degree than others they supervised. She claims that both were much more critical of her performance than of others, as well. At this point in time, Johnson was not absent a great deal and was not having problems following agency regulations, at least not those mentioned by Defendant as applicable to obtaining leave and reporting to the office regarding absences. Consequently, the DOL's argument that Johnson was not meeting performance expectations fails with respect to her claim that during the first six months of 1996 her work was more highly scrutinized than others.

Her next claim is that her supervisors made it much more difficult for her to obtain excused leave time than other employees. The time period complained of is from late July 1996 through the time her proposed removal from service was approved. The problem with the Defendant's argument that Johnson's absences with lack of office contact and failure to follow regulations for requesting leave caused her not to be satisfying its performance expectations, is that it seeks to use the very problem Johnson complains of to disqualify her from complaining. The *McDonnell Douglas* template is not

[4] Whether each of the three actually constitute adverse employment actions is dealt with in the next sub-section of this entry.

to be applied in a cookie cutter fashion; rather, it is to be applied in a manner that fits the circumstances of the case. *Flores v. Preferred Tech. Group*, 182 F.3d 512, 515 (7th Cir. 1999) (plaintiff who admitted to breaking work rules did not have her case tossed out for failure to meet performance expectations when her claim was that she was punished more harshly for the breach of rules than others). Johnson is not really challenging the fact that many of her attempts to obtain leave fell short of the technical requirements of the agency rules and regulations. She is arguing that others who were absent were not held to such stringent standards and that supervisor discretion has been used in the past to grant LWOP without requiring the type of information and certification asked from her. Consequently, it makes little sense to discuss whether she was absent a great deal or whether her leave applications were up to snuff, when the real issue is whether or not she was singled out with respect to the scrutiny of her absences and leave requests. *Curry v. Menard, Inc.*, 270 F.3d 473, 477-478 (7th Cir. 2001) (black cashier who claimed to have been punished more harshly than non-black cashiers when violations of a store policy occurred did not have her claim thrown out just because her breach of store policy was less than what employer expected of its employees).

Nor does it makes sense to discuss the "meeting expectations" requirement with respect to Johnson's claim of constructive discharge.[5] The basis for her removal from

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[5] Defendant actually tries to argue that there was no constructive discharge in this case because the conditions of Johnson's work environment were not unbearable. According to the DOL, conditions which are unendurable are a prerequisite to claiming constructive discharge regardless of any impending termination. That simply is not the case. When an employer has made it clear that it no longer wants or needs the services of an employee and, moreover, a specific termination date looms within a

(continued...)

federal employment was her accumulation of unexcused absences and her failure to follow rules and regulations relative to those absences. If it were determined that her supervisors did treat her leave requests with less leniency than others who were younger, male or who had not engaged in protected conduct, then a termination grounded in the tougher scrutiny would be unlawful, regardless.

Adverse Employment Action

It is at this stage of the analysis that Johnson's case starts to deteriorate. Defendant is correct when it argues that extra scrutiny and criticism, without something more substantive, do not add up to an adverse employment action. *See Haywood v. Lucent Tech., Inc.*, 323 F.3d 524, 532 (7th Cir. 2003). Johnson has not established the required quantitative or qualitative change to the terms and conditions of her employment as a result of the additional scrutiny or criticism she complains of during the time prior to her fall in 1996. *Id*. She was not demoted, she did not lose any pay or benefits, she did not slip down the administrative hierarchy. In short, such additional scrutiny may be evidence of discrimination, but it does not stand alone as an actionable employment action. *Beamon v. Marshall & Ilsley Trust Co.*, 411 F.3d 854, 862 (7th Cir. 2005).

On the other hand, Johnson's claims based upon the alleged higher standard

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[5](...continued)
matter of days, there is no need for the employee to await the fall of the guillotine's blade to make her case. *See E.E.O.C. v. Univ. of Chi. Hosps.*, 276 F.3d 326, 332 (7th Cir. 2002). Here, Johnson did what any reasonable person in her shoes would have done; she took advantage of an "early out" program to assure that she retained certain retirement benefits.

required of her to obtain approved leaves of absence and the approval of her removal from service are clearly adverse employment actions in and of themselves. Again, it was her inability to obtain approved leave which ultimately led to the Notice of Proposed Removal and it was the approval of that proposed removal which led to her acceptance of an early retirement option.

Others Outside the Protected Class Treated More Favorably

The final requirement for Johnson to establish a prima facie case is a showing that others who were younger, male or had not complained of discrimination were treated more favorably. This is generally accomplished through providing what is referred to in legal lingo as "comparables," *Peele,* 288 F.3d at 331; that is, by showing the court examples of similarly situated individuals who were treated more favorably, *id*. Plaintiff's own subjective opinion as to how she was treated in comparison to others is insufficient to survive summary judgment. *Oest v. Ill. Dep't of Corrections*, 240 F.3d 605, 614 (7th Cir. 2001). She makes much of the fact that under agency rules it was within the discretion of her supervisors to grant her LWOP right away following her fall because she had an illness and injury not of a permanent nature. She cites to pages of an exhibit submitted by Defendant as supporting this contention, but the court finds nothing on those pages (Bates stamped as Exhibits 47-0012 through 47-0014) that suggests the type of broad discretion to grant LWOP indefinitely as she seems to suggest. Even if the court assumes that such discretion exists, it is still incumbent upon Johnson to show the court that others received the benefit of that discretion and she did not.

To that end, Johnson offers but one comparable. She argues that Loretta Bonds, a retired employee of the OFCCP's Dallas, Texas office was allowed to be on LWOP for nine months with only occasional submissions of additional medical information. The undated affidavit of Loretta Bonds is submitted by Johnson in support of that contention. In the affidavit, Bonds states that she worked for the federal government for twenty-nine years and retired in 1997 from a position similar to that held by Johnson. In 1993 Bonds was diagnosed with carpal tunnel syndrome and filed a workers compensation claim. Like Johnson, she received forty-five days off under the agency's COP guidelines. She had surgery and returned to work half days, but later was found to have spinal impingement, causing her to be on LWOP for approximately nine months. According to Bonds, she would occasionally have to provide additional medical information, but never had to submit an additional leave request.

The problems with Bonds's declaration (entitled "affidavit") and Johnson's reliance on her as a comparable are substantial. First, as the DOL points out, the declaration does not meet the requirements of 28 U.S.C. § 1746, which provides that unsworn declarations submitted to a court be dated. Getting past the technical anomaly, her use of Bonds as a comparable does nothing to support Johnson's age or gender discrimination claims. The affidavit does not set forth Loretta Bonds's age or gender. However, if Bonds had twenty-nine years of service with the government when she retired in 1997, it is safe to say that she is not significantly younger than Johnson and would not be an appropriate comparable to probe the likelihood of age discrimination. In addition, while the court is reluctant to assume that any name is indicative of either

gender, it is Johnson's burden to establish that those she says were more favorably treated were outside the particular protected class at issue. Since Johnson refers to Bonds as "her" in Johnson's brief, the court assumes that Loretta Bonds is of the same gender as Barbara Johnson.

The affidavit does state that Bonds never filed any EEO complaint. So, if she were otherwise similarly situated to Johnson, she might be an appropriate comparable for purposes of the retaliation claim. However, that turns out not to be the case either. Bonds did not work in the same office, the same district or even the same region as Johnson. The size and work loads of the offices may not be comparable, the supervisors were different and, it appears that Bonds, unlike Johnson, did communicate with her office during absences and submitted appropriate medical documentation when requested. Moreover, it is not clear whether Bonds had her worker's compensation claim denied, as did Johnson. In order to be "similarly situated" or an appropriate "comparable" for purposes of analysis under federal discrimination laws, there must be a showing that the person is directly comparable in all material respects. *Patterson v. Avery Dennison Corp*., 281 F.3d 676, 680 (7th Cir. 2002). Different offices, different supervisors or differences in the actions taken by the persons being compared can, under any given context, result in an inappropriate comparison. *Id.*; *see also Spath v. Hayes Wheel's Int'l-Ind., Inc.*, 211 F.3d 392, 396 (7th Cir. 2000). Here the differences are so significant as to make comparison to Bonds non-probative and ineffective.

Legitimate Nondiscriminatory Reason & Pretext

The court could stop its analysis at this point since it has determined that Johnson failed to establish the fourth element of her prima facie case. However, even if it had found that there was enough admissible evidence of record to allow the case to proceed to the next level of analysis, the court would find Johnson's case lacking there as well. There is no question that the DOL has articulated a legitimate reason for its actions in requiring Johnson to submit medical and other information regarding leave to her supervisors. It is what is required of employees under agency rules and pursuant to the contract negotiated between the agency and Plaintiff's bargaining representative. Further, the DOL had a legitimate reason to pursue the removal of Johnson from service in light of the dozens of days she was classified as AWOL. Johnson's suggestion that all of this was just a pretext for discrimination just does not pass muster.

While the contents of the unsworn declarations[6] of former Indianapolis office employees Jack McDowell and Alice Dumas may provide Johnson with some solace or a sense of comradery with the makers, insofar as they reinforce her contention that Stepteau was quick to admonish and blame those under him and somewhat ruthless and vindictive in doling out criticism, the contents do nothing to support a claim that she was singled out for adverse treatment because she was female, older or had complained of discrimination. Rather, the affidavits state that both McDowell and Dumas chose to retire

[6] These unsworn declarations (also labeled "affidavits") were also submitted undated and without information which would allow a court to discern the time of signing.

rather than to work under Stepeau's management style of verbal assaults and undue criticism. They confirm that he treated most people under him the same way. Federal civil rights laws do not guarantee a pleasant place to work. *Patton v. Indianapolis Pub. Sch. Bd.*, 276 F.3d 334, 339 (7th Cir. 2002). They are intended only to assure that any hostility in the workplace or decisions by the employer are not rooted in a consideration of protected characteristics. *Id*. So, though Johnson's supervisors may have been harsh or tough with her, there is nothing to suggest that she was singled out or that the treatment was premised on her having made complaints against them or her age or gender. In short, no evidence of pretext has been advanced.

Conclusion

The DOL's Motion for Summary Judgment is well-taken. Johnson has failed to demonstrate that others similarly situated were treated more favorably than her. In addition, there is no evidence of record which would cause a reasonable fact-finder to disbelieve the legitimate nondiscriminatory reason offered by the agency for its actions toward Johnson. Accordingly, Defendant's Motion for Summary Judgment is **GRANTED**. Final judgment will be separately entered in favor of Defendant.

ALL OF WHICH IS ENTERED this 23d day of August 2005.

John Daniel Tinder, Judge
United States District Court

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